2008-CA-00173

IN THE SUPREME COURT OF MISSISSIPPI
IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DAVID J. CALDWELL, D.M.D. — APPELLANT-PLAINTFF

VS. — CASE NO. 2008-CA-00173

GLEN C. WARREN, SR., M.D., RIVER OAKS HOSPITAL, INC., and MISSISSIPPI NEUROSURGERY AND SPINE CENTER, PLLC — APPELLEES- DEFENDANTS

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Christopher H. Neyland, Esq., David L. Brewer, Esq.
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   Attorneys for David J. Caldwell, D.M..D.

2. David J. Caldwell, D.M.D., Appellant

3. James Becker, Esq., Mildred M. Morris, Esq.
   Watkins & Eager
   Attorneys for Glen C. Warren, Sr., M.D. and Mississippi Neurosurgery and Spine Center, PLLC

4. Glen C. Warren, Sr., M.D., Appellee

5. Mississippi Neurosurgery and Spine Center, PLLC, Appellee

6. Hon. William E. Chapman, III
   Rankin County Circuit Court Judge

Respectfully submitted, this the 4th day of June, 2008.

Christopher H. Neyland

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fraud against all the Defendants, and negligence per se for failing to maintain true and accurate hospital records.

The Complaint was answered by Dr. Warren November 9, 2005 and by Mississippi Neurosurgery and Spine Center, PLLC on May 17, 2006. On November 8, 2005, Dr. Warren submitted discovery requests to the Plaintiff, and Mississippi Neurosurgery and Spine Center, PLLC submitted discovery requests to the Plaintiff on January 30, 2006. On June 7, 2006, the Plaintiff responded to the discovery requests of Dr. Warren.

On February 5, 2007, Dr. Warren and Mississippi Neurosurgery filed a Motion for Summary Judgment or, in the alternative, to Dismiss. The basis of these Defendants' motion was the failure of the Plaintiff to identify a medical expert, as well as the existence of a prior pending action (being the identical complaint filed on August 12, 2005). On February 12, 2007, Dr. Warren and Mississippi Neurosurgery filed an identical Motion for Summary Judgment.

On February 15, 2007, Dr. Caldwell moved the trial court for additional time to file a response to the Motion for Summary Judgment. Dr. Caldwell and Mississippi Neurosurgery filed a response to Dr. Caldwell's motion for an extension of time on February 20, 2007. On February 28, 2007, Dr. Caldwell filed his Notice of Service of Discovery Responses and submitted to counsel for Dr. Warren and Mississippi Neurosurgery supplemented responses to interrogatories and requests for production of documents, and in so doing identified Dr. Caldwell's medical expert. Dr. Caldwell also filed his response to the motion for summary judgment on February 28, 2007.

A hearing on these defendants' motion for summary judgment was held on March 5, 2007. Pursuant to is March 19, 2007 Order, the trial court took the motion for summary

judgment under advisement. On April 4, 2007, Dr. Warren and Mississippi Neurosurgery filed a Supplemental Motion for Summary Judgment, in which they alleged that Dr. Caldwell's identified medical expert, Dr. John A. Frenz, M.D., is incompetent to testify as an expert due to the previous suspension of his medical license and their claim that he must have an unrestricted medical license before he can serve as an expert witness. On April 16, 2007, Dr. Caldwell again moved for an extension of time to respond to this Supplemental Motion for Summary Judgment, and filed his response to the Supplemental Motion for Summary Judgment on April 19, 2007, and said response included an affidavit from Dr. Caldwell's medical expert.

On May 8, 2007, the trial court issued its Opinion and Order, holding that these defendants were entitled to "dismissal" based upon (1) Dr. Caldwell's expert's loss of his license in 2001 and said expert's failure to have his license reinstated in an unrestricted form, and (2) the existence of the prior pending action (the August 12, 2005 complaint). A Partial Final Judgment as to these defendants was also filed on May 8, 2007.

On May 18, 2007, Dr. Caldwell filed his Motion to Reconsider and for Rule 54(b) Certification. These defendants responded to the Motion to Reconsider on May 25, 2007. After a hearing, the trial court denied Dr. Caldwell's Motion to Reconsider. However, the Order denying the motion to reconsider was mailed to a McComb post office box, not to either the post office box or the physical mailing address of Neyland & Brewer, PLLC, counsel for Dr. Caldwell. Counsel for Dr. Caldwell, upon learning of the existence of the Order denying the motion to reconsider, filed a Motion to File an Out of Time Appeal on October 26, 2007. Dr. Warren and Mississippi Neurosurgery responded to the motion to file an out of time appeal on November 16, 2007. The trial court granted the motion to file an out of time appeal on

STATEMENT OF THE FACTS

On June 17, 2003, David J. Caldwell, D.M.D. was admitted to River Oaks Hospital and underwent a two level anterior cervical discectomy with bank bone and the application of an anterior locking plate. The procedure was performed by Glen C. Warren, Sr., M.D. However, this was not the procedure Dr. Caldwell had agreed to have performed. Dr. Caldwell had agreed to the removal of two small bone spurs and the filling of those removed bone spurs with cadaver bone. On no less than two occasions prior to the June 17, 2003 surgery, Dr. Caldwell instructed Dr. Warren that he did not want and would not consent to the removal of a disc or vertebrae. (Record, pgs. 12, 74).

Immediately following the surgery, Dr. Caldwell began experiencing problems related to the surgery, including difficulty breathing, swallowing and sleeping, as well as severe pain and discomfort in his neck at the surgical site. (Record, pgs. 13, 73). Dr. Caldwell contacted Dr. Warren's office by telephone on numerous occasions following the surgery, and was prescribed various prescriptions by Dr. Warren's office. However, despite Dr. Caldwell and/or his wife repeatedly informing Dr. Warren's office of his pain and discomfort, Dr. Warren did not conduct a post-operative follow up visit with Dr. Caldwell until September 4, 2003, approximately eleven weeks after the June 17, 2003 surgery. (Record, pgs. 13, 76).

At the September 4, 2003 visit with Dr. Warren, Dr. Caldwell was informed by Dr. Warren, for the first time, that he had a locking plate and screws in his neck. (Record, p. 13). Dr. Caldwell was also then informed that the locking plate and screws had "backed out" and needed to be removed. On October 3, 2003, a second surgery was performed by Dr. Warren, in which the locking plate and screws were removed from Dr. Caldwell's neck. (Record, p. 13).

Dr. Caldwell asserts in his complaint and in his sworn interrogatory responses that the informed consent form for the June 17, 2003 surgery bears a forged signature, and he also asserts that Dr. Warren and Mississippi committed fraud and were liable pursuant to the doctrine of *negligence per se* for failing to maintain or deliberately destroying medical records and in failing to make said records available to him. (Record, pgs. 16, 17, 78).

On June 15, 2005, the statutorily required Notice of Intention to Commence Action was sent to Dr. Warren and to Mississippi Neurosurgery. (Record, p. 296). Sixty days beyond this date is August 14, 2005, which was a Sunday. (Record, p. 276). As Miss. Code Ann. §15-1-36 (1972, as amended) states that "If the notice is served within sixty (60) days prior to the expiration of the applicable statute of limitations, the time for the commencement of the action shall be extended sixty (60) days from the service of the notice for said health care providers and others", counsel for Dr. Caldwell filed two complaints; one on the Friday before August 14, 2005 (the August 12, 2005 complaint) and one on the Monday after August 14, 2005 (the August 15, 2005 complaint, the complaint upon which this appeal is predicated). The two complaints are identical and were filed in the same court (Rankin County Circuit). Only the August 15, 2005 complaint was served upon the parties.

After the complaint was answered and discovery was responded to, Dr. Warren and Mississippi Neurosurgery moved for summary judgment, based upon the failure of Dr. Caldwell to identify an expert, and upon the previously filed action. (Record, p. 49). Dr. Caldwell responded to this motion for summary judgment and identified a medical expert, at which point in time, Dr. Warren and Mississippi Neurosurgery filed a supplemental motion for summary judgment, objecting to the qualifications of Dr. Caldwell's expert, Dr. John A. Frenz, as he had

voluntarily surrendered his Mississippi license in 2002 and had not been reinstated without limitations. (Record, p. 169). Dr. Caldwell responded to the supplemental motion for summary judgment, and the court granted summary judgment predicated upon Dr Frenz's license being restricted and upon the existence of the previously filed lawsuit. (Record, p. 289).

SUMMARY OF THE ARGUMENT

The granting of the motion for summary judgment was erroneous. There is no requirement that an expert in a medical malpractice lawsuit be a licensed physician, nor is there any requirement that a proposed expert have an unrestricted license to practice medicine. The rules and regulations enacted by the Mississippi State Board of Medical Licensure themselves state as such. Additionally, the decisions of the Mississippi Supreme Court make it clear that an expert does not need to be a medical doctor in order to testify as an expert in a medical negligence matter.

The trial court also erred in granting summary judgment due to the existence of a previously filed lawsuit. The provisions of Miss. Code Ann. §15-1-36 (1972, as amended) require an extension of sixty (60) days from the date of service of the statutorily required notice of intention to commence a lawsuit against a medical provider. The statute does not say whether a case may be filed *within* sixty days of the notice letter. Nor does the statute state that the sixty day period can be extended should the 60th day fall on a weekend, as it did in this instance. As such, absent any indication as to how to proceed in such a circumstance, counsel for Dr. Caldwell was left with the choice of filing prior to running of sixty days, and a recent decision of the Mississippi Court of Appeals held that doing so was not in compliance with the statute, filing after the running of the sixty days (the August 15, 2005 complaint was filed 61 days after the notice of intent letter was sent to the defendants), or filing on both days out of an abundance of caution. The August 12, 2005 and August 15, 2005 complaints are identical, they are both filed in the same court, only one of the complaints was served on the defendants, and dismissal of this action based upon the existence of a previously filed action is an overly harsh result when the

alternative of consolidating the two actions was available to the trial court.

Finally, the motion for summary judgment (and the supplemental motion for summary judgment) did not address all of the issues of the Complaint. There are allegations of both fraud and *negligence per se* in the Complaint, and neither of these causes of action were addressed in the motions for summary judgment. As such, the dismissal of the entire Complaint as to Dr. Warren and Mississippi Neurosurgery was in error.

ARGUMENT

STANDARD OF REVIEW

Summary judgment is appropriate where it is shown that there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law. Miss. R. Civ. P. 56(c). The Court, in determining whether plaintiff's have a prima facie claim, review all the evidentiary matters in the record and the evidence in a light most favorable to the party against whom the motion has been made. Bullock v. Life Ins. Co. of Mississippi, 872 So.2d 658, 660 (Miss. 2004). The appellate courts in Mississippi employ a de novo standard in reviewing a trial court's grant of summary judgment. Dearman v. Christian, 967 So.2d 636, 638-639 (Miss. 2007).

1. **The trial court erred in granting summary judgment based upon the identification of an expert who had lost his license and did not have it reinstated until 2006, and who has never had it reinstated in an unrestricted form.**

In Thompson v. Carter, the Mississippi Supreme Court held that a toxicologist could serve as an expert on the issue of a physician's standard of care, even in the absence of a medical degree or license. Thompson v. Carter, 518 So.2d 609 (Miss. 1987). In Partin v. North Mississippi Medical Center, Inc., the Mississippi Court of Appeals held that there is nothing in state law that prevents an OB/GYN (or some other kind of specialist) from having expertise in general hospital procedures as well as another specialty or area. As long as the witness possesses particular knowledge that is not likely to be possessed by a layman, the witness may be qualified to testify as an expert. Partin v. North Mississippi Medica Center, Inc., 2003-CA-02206-COA (Miss. Ct. App. 2005). In this cause, Dr. Caldwell's expert is not only a licensed physician (and was at the time his opinion was given), but he has years of experience as a neurosurgeon and has

performed the procedure Dr. Warren performed on his patient Dr. Caldwell numerous times. As such, Dr. Caldwell's expert and the expert's opinion are sufficient to as a matter of law to substantiate the claim of medical negligence.

In their supplemental motion for summary judgment, Dr. Warren and Mississippi Neurosurgery site regulations adopted by the Mississippi State Board of Medical Licensure. (Record, pgs. 168-169). Specifically, they site Chapter 22, which pertains to rules regarding testifying as a medical expert, and which state that a medical expert must have an unrestricted medical license (Record, p. 169). However, §201 of Chapter 22 of these regulations states:

> No part of these regulations is intended to conflict with or supercede the authority of any state or federal court or administrative agency to designate a physician as a medical expert in a legal matter then pending before the court or agency. The Board does not intend for these regulations to conflict with or supercede the description or regulation of the function of a physician serving as an "expert" as that term is used in the Mississippi Rules of Evidence or in other provisions of law, rules, regulations, or decisions of any court or administrative agency.

Mississippi State Board of Medical Licensure Rules and Regulations, Chapter 22, Section 201.

It is clear that the Mississippi State Board of Medical Licensure does not define the standards of who is and is not qualified as an expert witness. The trial court's reliance on this "unrestricted" language contained in the regulation from the Mississippi State Board of Medical Licensure (Record, p. 289) was in error. The issue as to whether Dr. Frenz is a qualified expert is an issue that should be determined upon a hearing of Dr. Frenz's qualifications as an expert, and not merely because his license had previously been suspended and/or his medical license was restricted upon his reinstatement to practice medicine.

2. The trial court erred in granting summary judgment based upon the Plaintiff maintaining two separate actions based upon the same cause of action.

Counsel for Dr. Caldwell filed identical Complaints on Friday, August 12, 2005 and Monday, August 15, 2005, out of an abundance of caution in complying with Miss. Code Ann. §15-1-36, which states in relevant part, "If the notice is served within sixty (60) days prior to the expiration of the applicable statute of limitations, the time for the commencement of the action shall be extended sixty (60) days from the service of the notice for said health care providers and others."

The statutorily required Notice of Intention to Commence Action was sent to each of the Defendants on June 15, 2005. Sixty days beyond that date is August 14, 2005, which was a Sunday. The dual filings were done to try to insure compliance with §15-1-36, as it is unclear in the statute whether an action can be filed prior to the 60 day extension referenced above, or if an action has to be filed exactly on the 60th day after the service of the statutory notice.

The Mississippi Court of Appeals recently gave some clarity to this issue. In Williams v. Skelton, No. 2007-CA-00095 COA, the Court of Appeals held that filing a complaint *within* the sixty day time frame was not in compliance with the statute, and further held that "commencement of the suit...cannot begin until *after* sixty days have passed since the defendants were given notice of the intention to sue." Williams v. Skelton, No. 2007-CA-00095 COA (Miss. Ct. App. 2008).

The complaint at issue in this appeal was filed on August 15, 2005, sixty-one (61) days after the notice of intention to sue letter was sent to these defendants. The previously filed complaint was filed on August 12, 2005, fifty-eight (58) days after the notice of intention to sue letter was sent to these defendants. At the time of the filing, the opinion in Williams v. Skelton had not been rendered, and there was no authority as to how to proceed when the 60th day

following the service of a notice of intent to sue letter falls on a weekend. In point of fact, there is still no authority on the topic from an appellate court in Mississippi. But, as the law stands following the Williams v. Skelton decision, the August 12, 2005 complaint was filed prematurely (by two days) and should be dismissed. Except, the trial court has dismissed on summary judgment the August 15, 2005 complaint, due to the existence of the August 12, 2005 complaint.

Dr. Caldwell has not maintained two separate causes of action. As the defendants note, the two causes of action are identical. Further, Dr. Caldwell has not served process in the action filed on Friday, August 12, 2005. No claim has been split, as defined in Wilner v. White, 929 So.2d 315 (Miss. 2006). In Wilner, the Supreme Court held that a plaintiff could not sue new defendants in a separate lawsuit from the originally filed complaint, as doing so would be splitting the plaintiff's claims into two separate lawsuits. Dr. Caldwell does have two filed lawsuits, but they are identical lawsuits against identical parties. This is not splitting claims. If anything, the proper remedy in this matter would be to consolidate the two actions pursuant to Rule 42 of the Mississippi Rules of Civil Procedure.

Additionally, the reliance upon the doctrine of priority of jurisdiction is erroneous. Smith v. Holmes, 921 So.2d 283 (Miss. 2005), concerns a wrongful death claim and correctly states the law of wrongful death claims in that one wrongful death beneficiary is allowed to bring the claim, and other wrongful death beneficiaries are entitled to join the claim. The principal of priority of jurisdiction is where two suits between the same parties over the same controversy are brought in courts of concurrent jurisdiction, the court which first acquired jurisdiction retains jurisdiction over the whole controversy to the exclusion or abatement of the second suit. Lee v. Lee, 232 So.2d 370 (Miss. 1970). In the case at hand, there has not been two suits filed in

different courts, both of which have jurisdiction. The only filings have been in the Rankin County Circuit Court. As such, there is no issue as to priority of jurisdiction.

Rule 42 of the Mississippi Rules of Civil Procedure afforded the trial court the opportunity to consolidate the August 12, 2005 complaint with the August 15, 2005 complaint, and, as the statute in question (Miss. Code Ann. §15-1-36) is not clear as to how to proceed when the 60th day falls on a weekend, Dr. Caldwell would submit that the dismissal of his Complaint is an unfair and harsh result when the remedy of consolidation was available.

3. The trial court erred in granting summary judgment to all claims when the motion for summary judgment did not address each cause of action cited in the Complaint.

The Mississippi Supreme Court has characterized a final judgment as follows:

> A final judgment puts an end to the action, and disposes of the entire controversy, so that there is no further question for future determination by the court, except perhaps collateral or separate questions, and there is nothing left to be done but to enforce by execution what has been determined. A final decision generally is one which ends the litigation on the merits, and leaves nothing for the court to do but execute the judgment...

Fortune v. Lee County Bd. of Supervisors, 725 So.2d 747, 750 (Miss. 1998).

The Complaint filed by Dr. Caldwell contained a cause of action predicated upon fraud and a separate cause of action predicated upon *negligence per se*. Both the fraud and the *negligence per se* causes of action related to the failure to keep medical records, to make medical records available, as well as an allegation that Dr. Caldwell's signature had been forged on an implied consent form. (Record, pgs. 16, 17).

There is nothing in either the motion for summary judgment or the supplemental motion for summary judgment which addresses in any way these causes of action, neither of which are

predicated upon medical negligence. Additionally, neither the Opinion and Order (Record, p. 288-292) nor the Partial Final Judgment (Record, p. 293) addresses in any way the fraud and *negligence per se* causes of action. There is nothing on the record upon which the trial court could have relied in dismissing those two particular causes of action. As such, those causes of action have not been disposed of, and summary judgment should not have been granted as to those causes of action.

CONCLUSION

The granting of the motion for summary judgment was erroneous. The issue as to whether Dr. Caldwell's proposed expert is qualified is one that must be made after a hearing of the proposed expert's qualifications. It is not proper to summarily dismiss a proposed expert because the Mississippi State Board of Medical Licensure adopted rules which would prevent such an expert from being qualified as an expert. It is the trial and appellate courts of this state which establish the standards for qualifying as an expert, not the licensing board for physicians.

The existence of a previously filed lawsuit should also not be a basis for the granting of summary judgment. The state statute which governs medical malpractice filings gives no guidance as to how to proceed should the sixty day waiting period fall on a weekend. Also, the two complaints are identical, including identical as to the parties involved, both were filed in the same court, and only one of the complaints has been served upon the defendants. As such, there has been no splitting of claims, these defendants have not been prejudiced or otherwise harmed in any way, and the remedy of consolidation was available and proper given the circumstances.

Finally, the fraud and *negligence per se* allegations contained in the Complaint are not addressed in either the motion for summary judgment filed by these defendants, nor are they addressed in the Opinion and Order and Partial Final Judgment issued by the trial court. As such, they have not been disposed of, and summary judgment as to those claims was improper.

CERTIFICATE OF SERVICE

I, Christopher H. Neyland, one of the attorneys for the appellee, certify that I have this day mailed, via U.S. Mail, postage prepaid, a true and correct copy of the Brief of the Appellant to the following:

James A. Becker, Jr., Esq.
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Hon. William E. Chapman, III
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Dated, this the 12th day of June, 2008.

Christopher H. Neyland

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CERTIFICATE OF SERVICE

I, Christopher H. Neyland, one of the attorneys for the appellee, certify that I have this day mailed, via U.S. Mail, postage prepaid, a true and correct copy of the Brief of the Appellant to the following:

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Dated, this the 4th day of June, 2008.

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